IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-663

CHRYSLER MOTORS CORPORATION
AND
CHRYSLER CREDIT CORPORATION,

Petitioners,

v.

MARVIN H. GREENFIELD
AND
SUPERIOR DODGE, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WALTER E. LAAKE, JR.
Kaplan, Smith, Joseph,
Greenwald & Laake
1345 University Blvd., East
Langley Park, Maryland 20783

and

ROBERT F. WOOD, P.C.
800 Powers Building
Rochester, New York 14614
Attorneys for Respondents.

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QUESTION PRESENTED

Whether there are special and important reasons for this Court in its sound judicial discretion under Rule 19, Supreme Court Rules, to review on writ of certiorari the decision of the United States Court of Appeals for the Fourth Circuit in *Chrysler Credit Corporation v. Superior Dodge, Inc.* and *Superior Dodge, Inc., et al. v. Chrysler Credit Corporation, et al.*, 538 F.2d 616 (4th Cir. 1976), pet. for rehearing denied.

STATEMENT OF THE CASE

This case evolves from two separate actions filed in the United States District Court, District of Maryland, and eventually consolidated for trial November 18 through December 18, 1974. Chrysler Credit Corporation (hereinafter referred to as "Credit") instituted an action against Superior Dodge, Inc. (hereinafter referred to as "Superior") on December 11, 1970, which was responded to by a counterclaim from Superior which was met by Credit's own counterclaim against Marvin H. Greenfield (hereinafter referred to as "Greenfield"), and Betty Greenfield, alleging One Hundred and Seventy-Five Thousand Dollars ($175,000.00) still due on certain loans made to the Greenfields for the capitalization of Superior, a Chrysler-franchised Dodge automobile dealership.

On June 25, 1973, Superior and Greenfield filed a separate action against Chrysler Corporation and its five (5) wholly-owned subsidiaries, Chrysler Motors Corporation (hereinafter referred to as "Motors"), Chrysler Credit Corporation, Chrysler Financial Corporation, Chrysler Realty Corporation and Chrysler Leasing Corporation. Superior also moved to dismiss its counterclaim against Credit, *et al.* and Superior and Greenfield moved to consolidate the two (2) actions. Both motions were granted.

Superior and Greenfield's complaint alleged, in nine (9) separate counts, the following causes of action:

Count I –	Violation of the Dealer Day in Court Act, 15 U.S.C., Section 1221, *et seq.*
Count II –	Breach of Contract.
Count III –	Fraud.

Count IV –	Breach of Fiduciary Duty.
Count V –	Tortious Interference with contract and business relationships.
Count VI –	Conspiracy.
Count VII –	Sherman Antitrust Act, Sections 1 and 2.
Count VIII –	Clayton Antitrust Act, Section 3.
Count IX –	Clayton Antitrust Act, Section 7.

Prior to trial, the court severed the antitrust Counts VII, VIII and IX, and the case was tried to a jury on Counts I through VI only.

The jury found in favor of Credit against Superior and the Greenfields in the amount of Sixty-Six Thousand Six Hundred Fifty-Three and 02/100 Dollars ($66,653.02). The jury also found in favor of Superior and Greenfield against Motors on Counts I, III and V (Dealer Day in Court Act, deceit and tortious interference with contract). The jury further found in favor of Superior and Greenfield and against Credit on Counts II and III (breach of contract and deceit). The jury assessed damages in favor of Superior and Greenfield in the total amount of Four Hundred Eighty-One Thousand Six Hundred Dollars ($481,600.00): $115,584.00 to Superior and $366,016.00 to Greenfield).

On December 30, 1974, judgments were appropriately entered following which Motors and Credit moved for judgments n.o.v., one of the reasons being that of Superior's alleged lack of capacity to sue as a result of the forfeiture of its corporate charter. In opposition to this motion, Superior argued that Credit had waived this defense in suing and recovering a judgment against Superior and that Motors had failed to

preserve this argument when its Answer to Superior's Complaint had failed to sufficiently deny Superior's lack of capacity to sue. Superior, however, also moved to make Credit and Motors' argument moot when, under the revival provisions of the Annotated Code of Maryland, it revived the corporate charter of Superior and so advised the court by supplemental memorandum, attaching thereto a letter from the Maryland Department of Assessments and Taxation certifying that the "Articles of Revival for Superior Dodge, Inc. were received and approved for record on January 31, 1975 at 3:10 P.M.".

On May 15, 1975, the District Court, however, ruled that the revival of the charter was of no consequence and granted the judgment n.o.v. as to Superior only.

Timely appeals were filed by both sides and on July 26, 1976, the Court of Appeals reversed the District Court's granting of Motors' and Credit's motion for judgment n.o.v. against Superior because of the State of Maryland's statutory provisions as to the "effect of revival". In all other respects, the judgments below were affirmed.

REASONS FOR DENYING WRIT

I.

THE REINSTATEMENT OF SUPERIOR'S JUDGMENT AGAINST MOTORS AND CREDIT BY THE COURT OF APPEALS WAS REQUIRED BY MARYLAND LAW AND IN NO WAY DEPRIVES DEFENDANTS OF THEIR RIGHT TO TRIAL BY JURY NOR DOES IT CONFLICT WITH ANY OTHER COURT OF APPEALS OR SUPREME COURT DECISION, AS THE ISSUE MERELY INVOLVES THE APPLICATION OF MARYLAND LAW.

Four and one-half pages of Petitioners' brief are directed to reasons why the Court of Appeals was in error in reinstating Superior's judgment against Credit and Motors. It is argued at page 9, lines 18-21, that such action:

(a) "deprived Petitioners of their right to trial by jury"; and

(b) "conflicts with a prior decision of that court and other courts of appeal as to the proper procedure under Rule 50(b)".

An analysis of Petitioners' novel arguments in this matter demonstrates that they are without basis and have no application to the facts of this case.

In late 1970, Respondents' Dodge automobile franchise known as Superior Dodge, Inc. ceased doing business as a result of alleged wrongful conduct on the part of Credit and Motors. On April 18, 1973, Superior's corporate charter was forfeited for non-payment of taxes. Following the success of its lawsuit in which Superior was awarded a substantial judgment and while motions for judgment n.o.v. were pending, Superior revived its corporate charter and promptly

filed with the court a letter from the State of Maryland Department of Assessments and Taxation certifying that fact.

Under the Federal Rules of Civil Procedure, "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized". Federal Rule of Civil Procedure 17(B). Since Superior was a Maryland corporation, this rule makes the law of Maryland controlling on this issue. What then was the effect of the revival of Superior's charter? Article 23, Section 85(d) of the Annotated Code of Maryland[1] states:

> "*Effect of revival*—Such revival of the charter of the corporation shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when the charter was void, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits of the corporation at the time its charter became void and of which it was not divested prior to such revival shall be vested in the corporation, after such revivial, as fully as they were held by the corporation at the time its charter became void. The corporation after such revival shall be liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to such revival as if its charter had at all times remained in full force and effect."

---

[1] Repealed and incorporated into Annotated Code of Maryland, Corporations and Associations, §3-513 (1975).

Petitioners argue that the court has "added to the evidentiary record" and that they were deprived of "the opportunity to meet new evidence". This is not the case. The record of this one-month trial was in no way changed or enlarged. The status of Superior's charter is the only thing that changed. It was revived, and by its revival, Defendants' arguments as to lack of capacity became moot.

The legal effect of that revival on Superior is clear. "All . . . property . . . *of which it was not divested prior to such revival shall be vested in the corporation, after such revival,* as fully as they were held by the corporation at the time its charter became void. . . ." (emphasis added) On December 30, 1974, judgment in the sum of $115,584.00 in favor of Superior was entered. That judgment was not *divested* or *stricken* prior to the corporation's revival on January 31, 1975, notwithstanding the pendency of Defendants' motion for judgment n.o.v. If the substantive law of Maryland is to be given effect, then the Court of Appeals was correct in reinstating the judgment since the defect complained of was no longer in existence on May 15, 1975, when the trial court ruled on Defendants' motion.

The unequivocal language of the revival statute has been specifically held by the Court of Appeals of Maryland to apply to the ability of a corporation whose charter has been revoked to institute and pursue a legal proceeding. In *Redwood Hotel v. Korbein,* 197 Md. 514, 80 A.2d 28 (1951), a hotel company whose charter had been forfeited in November 1949 for nonpayment of taxes was able to file a petition for restitution based on a prior erroneous judgment in July 1950 and to appeal an adverse ruling on that petition in November 1950, even though the corporate charter was

not revived until December 1950. In other jurisdictions which provide by statute for forfeiture of a corporate charter on nonpayment of taxes and subsequent revival upon remittance of the taxes, courts have consistently recognized that revival validates corporate capacity with respect to suits filed during the time the charter was void. *See, e.g., Stutzman Feed Service, Inc. v. Todd & Sargent, Inc.*, 336 F. Supp. 417 (S.D. Iowa 1972); *Pacific Atlantic Wine, Inc. v. Duccini*, 111 Cal. App.2d 957, 245 P.2d 622 (1952); *A.A. Sutain, Ltd. v. Montgomery Ward & Co.*, 22 App. Div.2d 607, 257 N.Y.S.2d 724 (1965); *J.B. Wolfe, Inc. v. Salkind*, 3 N.J. 312, 70 A.2d 72 (1949); *Karnes v. Flint*, 153 Wash. 225, 279 P. 728 (1929).

Clearly, both the forfeiture and revival statutes at issue are essentially revenue-raising measures. Under Article 81, Section 204, Annotated Code of Maryland,[2] the state may invoke a summary forfeiture procedure as a penalty for a corporation's nonpayment of taxes and as an incentive to pay them. The revival statute is obviously intended to limit that penalty to cure the ill to which it is directed. Once the taxes are paid, it is intended that the corporation will no longer labor under the disabilities of revocation. As the wording of the act makes clear, rights and interests relating to third parties are undisturbed by the forfeiture once revival occurs. The language of the New Jersey Supreme Court on this issue is instructive:

> "The object of these statutes being solely the raising of revenue for the State . . . it would be inequitable to permit third persons, such as the

[2] Repealed and incorporated into Annotated Code of Maryland, Corporations and Associations, §3-503 (1975).

> defendants here, who had dealt with the corporation in the period when its charter had been forfeited to defend suits against them on this ground after the corporation had complied with RS 54:11-5, NJSA, and it had been reinstated as a corporation and entitled to all its franchises and privileges. *In good conscience the defendants, who are strangers to the dealings between the plaintiff and the State, should not be allowed to take advantage of the plaintiff's default in paying its taxes to escape their own obligations to the plaintiff, when its default has been cured by its subsequent compliance with the statutory requirements.*"
>
> *J.B. Wolfe, Inc. v. Salkind*, 3 N.J. 312, 70 A.2d 72, 76 (1949) (Emphasis added)

Petitioners also allege that the decision of the Court of Appeals in this case conflicts with one of its prior decisions, as well as two other decisions from other circuits. In support of this contention, Petitioners cite on page 12 of their brief *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975); *Midcontinent Broadcasting Company v. North Central Airlines*, 471 F.2d 357 (8th Cir. 1973); and *Hawkins v. Simms*, 137 F.2d 66, 67 (4th Cir. 1943).

In reviewing the decisions cited, however, Respondents failed to see the similarity or relevancy of these cases. Peggy O'Neill's recovery for medical negligence was overturned on a motion n.o.v. but reinstated on appeal by the Sixth Circuit. Following the trial of *Midcontinent Broadcasting v. North Central Airlines*, the trial judge granted an n.o.v. motion stating that he felt that he had been wrong in allowing certain expert testimony in over objection. The Eighth Circuit reversed saying that post-trial judicial misgivings warranted a new

trial, not an n.o.v. Finally, Petitioners cite the Fourth Circuit's prior decision of *Hawkins v. Simms,* which was an alienation of affections suit that resulted in a verdict for the plaintiff in the amount of $250.00. Defendant was granted a judgment n.o.v. after attaching a number of affidavits to his motion, all going to the credibility of the evidence relied on by plaintiff. The Fourth Circuit could not determine if the lower court had taken the affidavits into consideration and reversed the n.o.v., properly stating that "affidavits filed after verdict . . . cannot be considered on the question of sufficiency of the evidence" (at p. 67).

None of these "conflicting" decisions involve: A corporation's capacity to sue; revival of a corporation's charter; interpretation of Maryland's or any other state's law on charter revival; etc. Respondents submit that these decisions do not "justif[y] the grant of certiorari" as Petitioners claim.

II.

DEFENDANTS MAY NOT RAISE FOR THE FIRST TIME ON APPEAL ALLEGED ERROR IN THE CHARGE WHEN THE DEFENDANTS DID NOT TAKE EXCEPTION BELOW AND STATE DISTINCTLY THE GROUNDS FOR THE OBJECTION. FURTHER, INSTRUCTIONS TO THE JURY ARE TO BE CONSIDERED AS A WHOLE AND WHERE, AS IN THIS CASE, THEY FAIRLY AND ADEQUATELY COVER THE MATERIAL ISSUES, IT IS NOT ERROR TO REFUSE TO GIVE OTHER REQUESTED INSTRUCTIONS.

The trial court's charge to the jury in this case comprises twenty-six (26) pages in Volume VI of the Joint Appendix (pp. 2772-2798). Respondents are amazed at how the view of counsel for the Defendant

Motors has changed dramatically since the opinion expressed immediately following the charge:

> "I think that Your Honor gave the substance of most of—I only had ten specific instructions, but I think that Your Honor did not give the substance of Nos. 2, 3, 4, 5, and 10. May we take those up individually, Sir?" Appendix, p. 2807, l. 20.

Counsel for Motors and Credit now allege in their brief that "The District Court's hopelessly confusing jury instructions . . . failed to provide the barest guidelines to aid the jury . . . [so] as to deprive Petitioners of a fair trial. . . ."

Respondents submit that the only confusion flowing from Petitioners' Reason No. 3 is as a result of the manner in which Petitioners attempt to argue this point in their brief. The law is well settled that alleged errors in the charge and in refusal to give special instructions are not properly before an appellate court when no excpetions to the charge are taken or when defendant, in taking its exceptions, did not state distinctly the matter objected to and the grounds of the objection. Rule 51, Federal Rules of Civil Procedure, 28 U.S.C. Further, a party may not state one ground when objecting to an instruction and attempt to rely on a different ground for the objection on appeal. Wright and Miller, *Federal Practice and Procedure:* Civil Sec. 2554. Consequently, Motors and Credit are limited to the exceptions properly taken following the charge and for the reasons espoused at the time the exception was made. With respect to Motors, this would appear to limit their argument to their requested Instructions 2, 3, 4, 5 and 10, and an additional two exceptions made later in the bench conference. With respect to Credit, counsel on the record excepted to the failure of the

trial court to grant sixteen of his 31 requested instructions. The trial court's remark immediately following Credit's last exception is most illuminating:

> "Again, I think the charge as given adequately covers the issues. Most of the exceptions have been taken, if given, would require an instructed verdict to the jury, and take away from them the province of their determination, so I am satisfied that the charge as given is proper." Appendix, p. 2816.

In its Motion for Judgment N.O.V. or New Trial, Motors assigned as error the failure to give its Requested Instructions Nos. 1, 2, 3, 4, 5 and 10.

In its Motion for Judgment N.O.V. or in the Alternative for New Trial or Remittitur, Credit assigned as error the failure of the court to instruct the jury in accordance with its previously requested instructions.

The trial court responded to their motion rather succinctly in the opinion and order that were filed in the case:

> "Chrysler Credit and Chrysler Motors also move for a new trial in Civil No. 73-646-Y. The Court finds no merit in their motions, and they will be denied."

Undaunted, Motors and Credit, in their appeal to the Fourth Circuit Court of Appeals, again alleged error in the charge. Motors this time merely ascribed as error the failure to give its Requested Instruction No. 1 (dealing with Count I) and argued, in general, that the court's charge on Count I was in error. Motors also objected (for the first time) to the trial court's instruction on allocating damages between the plaintiffs. No other error in the charge was alleged by Motors in its brief.

Similarly, Credit, in its appeal brief, reduced its allegations of error in the charge to the jury from the failure to give 16 of its requested instructions, as stated in its new trial motion, to the failure by the court to give eight of its specifically requested instructions. As Credit states in its appeal brief, "Credit also sought *amplification* of the generality of the charge. . . ." (pp. 61-62) "Credit's requests for *amplification* of these instructions, all of which were rejected by the Court, included the following . . ." (p. 64) (Emphasis added)

As the Second Circuit stated in *Oliveras v. United States Lines Co.*, 318 F.2d 890 (2nd Cir. 1963):

> "If the charge as given is correct and sufficiently covers the case so that a jury can intelligently determine the questions presented to it, the judgment will not be disturbed because further *amplification* is refused. (citations omitted) Our appellate function is to satisfy ourselves as the instructions, taken as a whole and viewed in the light of the evidence, 'show no tendency to confuse or mislead the jury with respect to the principals of law applicable' (citations ommitted)." 318 F.2d at 892.
>
> (Emphasis added)

Those few instructions, specifically requested and disallowed defendants, were presented in their entirety in the Joint Appendix filed with the Fourth Circuit Court of Appeals. The court could compare the requested instructions to the charge that was given in light of the evidence in the case. The appellate court found Motors and Credit's argument without merit.

Now, in 12 pages of its brief urging that a writ of certiorari be issued, Motors and Credit have adopted a "shotgun approach", alleging error throughout the trial

judge's charge. Unfortunately, the Petitioners cannot be heard to complain now, when no complaint was made at the time of trial. For example, throughout their brief, Credit and Motors attack both, directly and indirectly, the court's jury verdict form used to aid the trier of facts in deciding the issues. Petitioners complain:

> (a) "the jury was not instructed . . . to specify which . . . acts of Motors and Credit it found to be misrepresentations, tortious interferences with contractual relations or breaches of contract" (p. 14)
>
> (b) "the jury was requested to find for both respondents if it found for either" (pp. 15 and 20)
>
> (c) "the jury was not required to . . . specify the basis on which it found liability" (p. 19)
>
> (d) "in addition to these and other specific defects, the trial court's undifferentiated jury charge and *verdict form* . . ." (p. 23)

None of these complaints, however, were made at the trial below. On the morning of December 18, 1974, the trial court presented counsel with a special jury verdict form that it intended to give the jury to take with them to the jury room, in an effort to make their task as simple as possible. Following the court's instructions to the jury, counsel for Credit, in a bench conference (Appendix 2811), remarked:

> "As to the form, although the court's instruction was perfectly clear on the point, the form does not include Mr. and Mrs. Greenfield in [sic(as)] the defendants in the plaintiff's case."

With that correction, the special jury verdict form was given to the jury.

At no time did Motors or Credit object to the use of the jury verdict form. There was no objection to the court's characterizing Greenfield and Superior as one plaintiff in determining the defendants' liability for the various counts. There was no objection by Credit or Motors to the court's request that the jury make an allocation of damages "if you can make the determination from the evidence that is available to you". Neither Motors nor Credit filed a requested jury instruction on the proper method of allocating damages between the corporate and individual defendant, and neither took an exception to the court's instruction to so allocate their award.

Not having timely objected when the jury verdict form and instructions were given, Motors and Credit cannot now claim that to do so was error.

As the court in *Kirkendol v. Neustrom*, 379 F.2d 694, 698 (10th Cir. 1967), stated:

> "It is alleged that the special interrogatories given to the jury were in error. No objection was made to the interrogatories at the time they were given or before the jury retired. 'In this light of the record the question may not be raised for the first time on appeal.' *St. Louis-San Francisco Railroad Company v. Simons*, 176 F.2d 654, 660 (10th Cir. 1949); Rule 51 F.R.Civ.P."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WALTER E. LAAKE, JR.
Kaplan, Smith, Joseph,
Greenwald & Laake
1345 University Blvd., East
Langley Park, Maryland
20783

ROBERT F. WOOD, P.C.
800 Powers Building
Rochester, New York 14614

Attorneys for Respondents.

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